hold that in a case such as this one, where: (1) the claim before the bankruptcy court is wholly derived from another legal claim already pending in a parallel, out-of-state, non-bankruptcy proceeding; and (2) the pending original, or "source," claim was filed in a court prior to the commencement of the bankruptcy case, bankruptcy courts should apply the choice of law rules of the state where the underlying prepetition claim was filed.

We therefore VACATE the district court's order and REMAND the case to the district court with instructions to remand the case to the bankruptcy court and, in so doing, instructing the bankruptcy court to apply the choice of law rules of Connecticut to decide Statek's motion for reconsideration.

I. Background

Coudert, the debtor in this case, was for over a century one of the world's leading international law firms. The claimant is one of Coudert's former clients, Statek Corporation.[1] Statek's claim is based on an asserted tort, legal malpractice, committed by Coudert against Statek during the course of their attorney-client relationship. Statek's allegations are roughly as follows.

From 1984 until 1996, Statek was controlled by Hans Frederick Johnston. Johnston, who had obtained control of the company by fraud, devoted most of his tenure with Statek to looting the corporate treasury and traveling lavishly at the company's expense. In furtherance of his schemes, Johnston caused Statek to retain Coudert in 1990. Although Coudert's fees were paid

[1] Statek originally filed the proof of claim on behalf of itself and its parent corporation, Technicorp International II, Inc. ("TCI-II"). TCI-II was subsequently dropped from the complaint underlying the proof of claim, however, and Statek proceeded through the claim objection proceeding as the only claimant.

by Statek, the firm counseled Johnston personally, helping him to hide and launder various assets stolen from Statek. Among other things, lawyers in Coudert's London office created secret shell corporations, established offshore asset protection trusts, procured safe deposit boxes in the name of those trusts, assisted with West Indian real estate purchases, and coordinated the removal from the United States of a multi-million dollar art and stamp collection.

Eventually, Johnston's crimes were discovered. He was removed from power and was sued by Statek for fraud and waste. While the fraud and waste lawsuit was ongoing, Statek strove to locate company funds that Johnston and his associate Sandra Spillane misappropriated. The search only intensified after Statek obtained a judgment against Johnston and Spillane for over $30 million. Progress was slow because Johnston had spread his ill-gotten gains widely, moving money into and out of shell corporations, offshore trusts, art and collectibles, and a variety of other laundering devices. Many of the assets were believed to be in the hands of third parties.

For assistance, Statek turned to its old law firm, Coudert. As the fraud and waste lawsuit got underway in 1996, Statek sent a request to Coudert for any information and all files relating to its representation of Statek during the Johnston years. Coudert responded with six files pertaining mostly to the creation of a Statek subsidiary. After Statek secured a large money judgment against Johnston, it and two other judgment creditors forced Johnston into involuntary bankruptcy in the United Kingdom. At that point, a trustee was appointed for Johnston's estate and charged with collecting its assets. In 2002, the trustee approached Coudert for information about its representation of Statek and learned about Courdert's work for Johnston moving art to Europe. More inquires led to more revelations. By 2004, the trustee had learned of Coudert's

role in setting up Johnston's offshore asset protection trusts, obtaining secret safe deposit boxes, and facilitating the West Indian property deal.

Statek believes that Coudert's delay turning over files and information, to which as a former client it was entitled, allowed Johnston to irretrievably dispose of millions of dollars. Statek also asserts that if Coudert had been forthcoming about its representation during Johnston's reign, Statek would have saved the time and money it was forced to expend recovering assets hidden around the world. All told, Statek claims that Coudert's inaction has cost it in the neighborhood of $85 million.

In October 2005, Statek filed a malpractice lawsuit against Coudert in state court in Connecticut where Johnston had allegedly lived, run Statek, and received many of Coudert's services.[2] Several months later, Coudert—which was already in dissolution—filed a motion to dismiss Statek's action on the basis of lack of personal jurisdiction and *forum non conveniens*. On September 22, 2006, while that motion was pending, Coudert filed a petition for Chapter 11 bankruptcy in the Southern District of New York. This filing triggered an automatic stay of Statek's Connecticut action pursuant to 11 U.S.C. § 362. In the bankruptcy court, Statek thereafter filed a proof a claim based on its pending malpractice action, and it attached to its claim as an exhibit the complaint it had filed in state court almost a year earlier. In March 2007, Coudert removed the Connecticut action to the United States District Court for the District of Connecticut pursuant to 28 U.S.C. § 1452, which allows for removal of any state court action

[2] The state action also named several individual partners at Coudert, but none of those parties are involved with the bankruptcy claim at issue here.

over which there is bankruptcy jurisdiction.[3] Once the Connecticut action was removed, Statek moved the bankruptcy court in New York for relief from the automatic stay so that it could proceed with the malpractice action in federal district court in the District of Connecticut. Coudert objected, and the two sides ultimately compromised: the stay was lifted only as to conducting discovery on and resolving Coudert's motion to dismiss in the Connecticut action. In February 2008, the district court in Connecticut (Underhill, *J.*) conditionally dismissed Statek's complaint on *forum non conveniens* grounds, but Coudert would not consent to the conditions.[4] The case thus remained pending in Connecticut and the stay was automatically reimposed. In June 2008, Statek again moved the bankruptcy court for relief from the stay, and the parties again settled on less than a full relief from the stay. In August 2008, the stay was partially lifted so that Statek could file an amended complaint in the District of Connecticut, which was also incorporated into its proof of claim pending in the bankruptcy court. Additionally, the bankruptcy court granted relief from the stay to allow for mediation between the parties and Coudert's malpractice insurer with the hopes of liquidating the claim. As might be inferred, the mediation failed and, in March 2009, the Plan Administrator (Coudert's Chapter 11 Plan for Liquidation having been confirmed) filed a motion in bankruptcy court to disallow the claim. Although motions to disallow claims are "core proceedings" for the purposes of 28 U.S.C. § 157, the validity of Statek's claim turned on a finding of tort liability against Coudert. Under these

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[3] Because Statek sought damages from Coudert, the Connecticut action was certainly "related to" Coudert's bankruptcy case, and the bankruptcy court thus had original, though not exclusive, jurisdiction over it pursuant to 28 U.S.C. § 1334(b).

[4] The district court made dismissal contingent on Coudert (1) agreeing to lift the automatic stay, which would permit Statek to file in another forum, and (2) waiving any statute of limitations defense in the new forum.

circumstances, the bankruptcy court—with the consent of the parties—applied the procedural rules of an "adversary proceeding" to the dispute, treating the Plan Administrator's motion to disallow as a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

In July 2009, the bankruptcy court, relying on our decision in *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 601-02 (2d Cir. 2001), applied New York choice of law rules to Statek's claim. Under New York's anti-forum shopping "borrowing statute," N.Y. C.P.L.R. § 202, the bankruptcy court determined that because Statek was a non-resident, its claim must be judged by the shorter of either New York's statute of limitations or the statute of limitations of the jurisdiction where the claim accrued (presumably Connecticut or the United Kingdom). As Statek had already conceded that its claim was untimely under the New York statute of limitations, the bankruptcy court determined that provision to be as short as or shorter than any other possibilities, applied it, and disallowed the claim.

Statek filed an unsuccessful motion for reconsideration and then sought to have its claim reinstated on appeal to the United States District Court for the Southern District of New York (Hellerstein, *J.*). That district court affirmed the bankruptcy court's two orders. Statek now appeals that decision.

II. Discussion

A. The District Court's Appellate Jurisdiction

At the time Statek appealed to the district court, a party seeking review of a bankruptcy judge's decision had ten days from "the date of the entry of the judgment, order, or decree" to file a notice of appeal to a district court or bankruptcy appellate panel. Fed. R. Bankr. P. 8002(a)

(2009).[5] The ten-day deadline is tolled if one of a specified list of motions is filed in the bankruptcy court. *See* Fed. R. Bankr. P. 8002(b) (2009). But once the time to appeal runs, a district court or bankruptcy appellate panel has no jurisdiction to consider an untimely appeal. "[T]he time limit contained in Rule 8002(a) is jurisdictional, and . . . in the absence of a timely notice of appeal in the district court, the district court is without jurisdiction to consider the appeal, regardless of whether the appellant can demonstrate 'excusable neglect.'" *Siemon v. Emigrant Sav. Bank (In re Siemon)*, 421 F.3d 167, 169 (2d Cir. 2005).

Appellee Plan Administrator challenges the timeliness of Statek's appeal to the district court from the bankruptcy court's initial order disallowing the claim.[6] (Appellee's Br. 2 n.2.). Its argument is based on the following timeline:

7/21/2009	Bankruptcy court order disallowing Statek's claim.
7/31/2009	Statek's motion for reconsideration filed.
9/8/2009	Bankruptcy court denies motion for reconsideration.
9/16/2009	Statek appeals both orders to the district court.

[5] Effective December 1, 2009, Rule 8002 now provides a fourteen-day window to file a notice of appeal.

[6] We may (and indeed must) consider the timeliness of the notice of appeal, even though the Plan Administrator apparently failed to present the issue to the district court. Rule 8002 is jurisdictional. *See In re Siemon*, 421 F.3d at 169. A circuit court has an "independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 287 (2d Cir. 2011) (quotation marks omitted). "For that reason, every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quotation marks omitted). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it." *Id.* "When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* (alterations omitted).

Accordingly, regardless of whether the motion for reconsideration tolled the time to appeal the bankruptcy court's initial order, Statek's appeal of that order disallowing its claim was untimely. Its appeal of the denial of the motion for reconsideration, however, was timely. The district court's review—and, by extension, our review as well—is thus limited to the bankruptcy court's denial of Statek's motion to reconsider.

B. Standard of Review

When reviewing a bankruptcy court decision that was subsequently appealed to a district court, we review the bankruptcy court's decision independent of the district court's review. *U.S. Lines v. United States (In re McLean Indus., Inc.)*, 30 F.3d 385, 387 (2d Cir. 1994); *see also DISH Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 94 (2d Cir. 2011) ("We look through the district court to the bankruptcy court's decision . . . ."). A bankruptcy court's denial of a motion to reconsider a disallowed claim is a discretionary decision, reviewed under the familiar and deferential abuse-of-discretion standard. *See Univ. Church v. Geltzer*, 463 F.3d 218, 228 (2d Cir. 2006); *see also Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 202 (3d Cir. 2003) (appeals court "review[s] the Bankruptcy Court's legal determinations de novo, its factual findings for clear error, and its exercises of discretion for abuse thereof" (quotation marks omitted)). Although this standard affords a bankruptcy judge substantial latitude, "we nonetheless remain mindful that a bankruptcy court would *necessarily* abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Klein v. Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.)*, 279 F.3d 148, 152 (2d Cir. 2002) (alteration and quotation marks omitted, emphasis added).

C. Choice of Law

We are faced in this case with apparently conflicting rules on choice of law in federal cases. It is well established that a federal court sitting in diversity must generally apply the choice of law rules of the state in which it sits. And it is now well established that a bankruptcy court must also apply state choice of law rules. But it is also clear that when a case is transferred, the choice of law rules of the state in which the case was initially filed transfer with it. This case presents a hybrid situation, and requires us to decide which state's choice of law rules should apply when a bankruptcy court sitting in one state is resolving a bankruptcy claim arising from a state-law action previously filed in another state.

1. *Choice of Law Rules in Diversity Cases*

When a federal district court sits in diversity, it generally applies the law of the state in which its sits, including that state's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).[7] "There is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Applying *Erie*, *Klaxon* held that state choice of law rules are substantive state law. 313 U.S. at 496. *Klaxon*'s logic provides important foundational principles for our analysis in this case. "Once it is recognized that federal choice of law rules are a species of federal common law, the . . . ability of the federal courts to create federal common law and displace state created rules is severely limited." *In re Gaston*, 243 F.3d at 606. The federal courts are not powerless to displace state choice of law rules,[8] but, without express

[7] When a district court exercises federal question jurisdiction, federal law provides the substantive rules of decision and there is generally no need to consider choice of law.

[8] This would be in contrast to any substantive state laws that relate exclusively to matters outside the purview of the federal courts—perhaps, for example, certain elements of state family

authorization from Congress, we can do so only by making federal common law. Given the separation of powers as between Congress and the judiciary, this is not the preferred method of displacing state substantive law. Indeed, as the Supreme Court recently stated:

> Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal *courts* should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken the prudent course of adopting the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.

Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (emphasis added) (citations and citation marks omitted); *see also Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."). In most situations this "demonstrated need for a federal rule of decision," *see American Electric Power*, 131 S. Ct. at 2536, arises because application of state law would conflict with a federal policy or interest, *see Atherton v. FDIC*, 519 U.S. 213, 219 (1997).

2. *Choice of Law Rules in Bankruptcy Cases*

Klaxon and its progeny set forth clear rules for federal courts sitting in diversity. But the rules for bankruptcy courts are more difficult to discern. 28 U.S.C. § 1334(b) vests the district courts with original jurisdiction over civil proceedings "arising under," "arising in," or "related

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law. From a federalism perspective, the limits on the federal courts' power to create common law track those of Congress's legislative power. *See Erie*, 304 U.S. at 78-79; *cf.* Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 713-14 (2d ed. 1973) (federally-created choice of law rules applicable in the federal courts do not create federalism problems because Congress has the power to create, or delegate authority to create, rules for the courts that are "necessary and proper" to the exercise of federal court jurisdiction).

to" cases under the Bankruptcy Code. Such jurisdiction extends not only to questions of federal law, but also to many state law disputes. *Erie* made clear that state law provides the rules of decision for the *merits* of state law claims in bankruptcy court. 304 U.S. at 77. Until recently, however, there was controversy about whether state or federal law should provide the means for choosing the state law that is ultimately applied to decide a state law claim in bankruptcy court—the choice of law. We partially resolved this issue in *In re Gaston*, 243 F.3d 601, where we held that state, not federal, choice of law rules must control.

In re Gaston concerned an adversary proceeding filed by the trustee of a bankrupt law firm's estate to collect unpaid legal fees from a former client. The bankruptcy proceedings were held in the Southern District of New York, and it was there that the trustee initiated the adversary proceeding. The client who owed the fees, however, lived in Idaho, and it was in Idaho where the law firm's services had been rendered. The district court[9]—without discussion—followed *Klaxon*, applied New York choice of law rules, and determined that New York's borrowing statute required application of the New York statute of limitations. 243 F.3d at 604, 609.

On appeal we held that, although the source of the district court's jurisdiction was bankruptcy, not diversity, *Klaxon* nevertheless provided guidance. *Id.* at 601-02. We recognized that because bankruptcy is a form of federal question jurisdiction, bankruptcy courts in some of our sister circuits apply federal choice of law principles rather than state choice of law rules, *see id.* at 605 & n.6 (citing cases), but we rejected this approach. We noted that after *Klaxon* federal

[9] At some point, pursuant to 28 U.S.C. § 157, the district court withdrew its referral of this proceeding and conducted a jury trial itself. *See In re Gaston*, 243 F.3d at 605 n.5.

choice of law rules must be regarded as "a species of federal common law." *Id.* at 606. And because federal common law should be applied only where there is "a significant conflict between some federal policy or interest and the use of state law," *id.* at 606 (quoting *Atherton*, 519 U.S. at 218), we were loath to use it. We concluded, therefore, that unless there was an important federal interest or policy concern that would justify application of federal choice of law rules in place of state choice of law, the district court's decision should stand. Finding no such interest or concern, we affirmed the district court's decision to use state rather than federal choice of law rules. *Id.* at 607.

3. *Choice of Law Rules when Bankruptcy Claim Consists of a Previously-Filed State-Law Action*

The bankruptcy court read *In re Gaston* as requiring it to apply the choice of law rules of its forum state, New York, which thereby caused it to disallow Statek's claim. On appeal Statek disagrees that New York's choice of law rules control. It argues that the applicable choice of law rules are those of Connecticut, where Statek filed its original malpractice action. *In re Gaston*, although adopting the general rule that bankruptcy courts must apply state choice of law rules, provides no guidance as to *which* state's choice of law rules apply. That is a question of first impression, to which *Klaxon* provides the answer.

As noted above, *Klaxon* partly concerned whether state or federal choice of law should apply in diversity cases. But *Klaxon* also addressed *which* state's choice of law controls, requiring district courts to apply the state choice of law rules of the state in which they sit. 313 U.S. at 496. Practically, this rule prevents forum shopping between the state and federal court systems ("intra-state forum shopping"), which was apparently a serious problem in the pre-*Erie* days of general federal common law. Back then, if the law applied by the federal district court

of a state was more favorable to plaintiffs than the law of that state's own courts, prospective plaintiffs had an incentive to create diversity jurisdiction (often by reincorporating out of state) and file in federal court. Indeed, the *Erie* Court's decision to eliminate general federal common law was in part justified by intra-state forum shopping concerns. *See Erie*, 304 U.S. at 74.

Klaxon echoes *Erie*'s hostility toward intra-state forum shopping. By requiring federal courts to treat a claim exactly the same as would the courts of the state in which they sit, *Klaxon* ensures that a plaintiff's choice of forum within a given state will not be influenced by choice of law considerations. According to the Court in *Klaxon*, any other result would allow "the accident of diversity of citizenship [to] constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." 313 U.S. at 496.

This effective bar on intra-state forum shopping comes, of course, at the expense of permitting forum shopping between states ("inter-state forum shopping"), which *Klaxon* regards as an unavoidable consequence of the federal system. *See* 313 U.S. at 496. Over time, however, inter-state forum shopping has come to be perceived less as a necessary evil of federalism and more as a right to be enjoyed by plaintiffs and protected for their benefit. Thus, in *Van Dusen*, 376 U.S. 612, the Supreme Court held that when a defendant obtains a change of venue under 28 U.S.C. § 1404(a), the choice of law rules of the state where the plaintiff originally filed the claim "follow" the action to the new forum. In deciding the issue, the Court described the prerogative federal law affords plaintiffs to choose among federal forums as a "venue privilege," and the Court cautioned against construing § 1404(a) in a way that would "defeat the state-law advantages that might accrue from the exercise of this venue privilege." *Van Dusen*, 376 U.S. at 635. When applying *Klaxon*, "the critical identity to be maintained is between the federal

district court which decides the case and the courts of the State in which the action was filed." *Id.* at 639.

Van Dusen, in other words, is far less concerned about the fact that plaintiffs may engage in inter-state forum shopping on the basis of competing choice of law doctrines than it is with making sure that *only* plaintiffs engage in forum shopping. In deciding where to file a claim, plaintiffs are permitted to forum-shop among state courts. But once that claim is filed, defendants in state courts are generally locked into the forum unless removal is possible. If a *defendant* could forum-shop using § 1404(a) to transfer venue and obtain different choice of law rules, the defendant would "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed," the main evil *Klaxon* sought to avoid. *See Van Dusen*, 376 U.S. at at 638.

Any remaining doubt about the Supreme Court's tolerance for inter-state forum shopping by plaintiffs was put to rest in *Ferens*, 494 U.S. 516. There, the Court extended *Van Dusen*'s rule to cover *plaintiff-initiated* transfers under § 1404(a). *Ferens*, 494 U.S. at 519. While recognizing its rule would allow plaintiffs to separate their shopping for favorable choice of law rules from their ultimate choice of forum, *id.* at 531, the Court believed a plaintiff's right to shop for favorable choice of law rules is so important that it should not be compromised "by being put to a choice between a choice of law versus forum," *id.* at 529. Under *Ferens*, a plaintiff may "have his cake and eat it too." *Id.* at 537 (Scalia, *J.*, dissenting).

Shopping for favorable choice of law rules very often comes down to shopping for favorable statutes of limitations. *See, e.g.*, *Ferens*, 494 U.S. at 519-20; *Van Dusen*, 376 U.S. at 630-32 & n.26. To mitigate against abusive statute-of-limitations shopping, some states have

created mechanisms—binding on the local federal courts via *Klaxon*—that discriminate against claims accruing out of state. New York's borrowing statute, N.Y. C.P.L.R. § 202, guards against forum shopping by out-of-state plaintiffs by mandating use of the *shortest* statute of limitations available. If New York's statute of limitations is shorter than the statute of limitations of the place where the cause of action accrued, New York courts should apply the local rule; if the foreign statue of limitations is shorter, then that is what controls.

Given all this, it is perhaps not surprising that the issue at the heart of this case is—as it was in *In re Gaston*—whether New York's borrowing statute should apply in federal bankruptcy proceedings held in the Southern District of New York. In *In re Gaston*, both principles underlying *Klaxon* were served by applying New York law (the forum state of the bankruptcy court in that action) to the trustee's collection action. *In re Gaston*'s holding avoided relying on federal common law and also ensured that the trustee's claim would be treated the same in federal court as it would have been in state court. We recognized that the facts of *In re Gaston* were largely analogous to a *non-transfer* diversity case. The trustee for the law firm's estate brought, for the first time, a claim in bankruptcy court in New York that, but for the bankruptcy, could have been brought by the law firm in New York state court. If the law firm in *In re Gaston* had attempted to collect on its unpaid fees in a New York court before bankruptcy was filed, New York's borrowing statute would have applied. *Klaxon*'s goal of establishing equal treatment of claims by the state and federal courts would clearly have been violated by a rule applying a different state's law to the claim simply because the law firm filed for bankruptcy and its interest in the fees was assigned to the trustee of its estate. In *In re Gaston*, the trustee—the

party bringing the claim—chose the forum, and principles of state/federal uniformity compelled us to apply the law of the state of that forum.

The same cannot be said in this case. Except by the most formalistic of interpretations, Statek—the claimant here—did not choose to litigate in New York. Instead, it affirmatively chose to file its complaint against Coudert somewhere else. The record is clear that Statek exercised its venue privilege in favor of Connecticut. Only in the midst of the Connecticut proceedings—well after they were initiated, when Coudert had filed for bankruptcy—did Statek come to New York. Realistically, Statek had no other option. *Cf. Stern v. Marshall*, 131 S. Ct. 2594, 2614 (2011) (creditor-plaintiff "did not truly consent to resolution of [state-law claims] in the bankruptcy court proceedings," because by operation of the Bankruptcy Code, "[h]e had nowhere else to go if he wished to recover from [the] estate."). That Statek's participation in the bankruptcy is an extension of the Connecticut action is beyond doubt. Statek could only hold itself out as a potential creditor in the bankruptcy by virtue of the pending Connecticut action, and, accordingly, its proof of claim was nothing more than a copy of the Connecticut complaint. The two proceedings are functionally one and the same.

Under these circumstances, it would be fundamentally unfair to allow Coudert's bankruptcy, coming as it did in the midst of the Connecticut action, to deprive Statek of the state-law advantages adhering to the exercise of its venue privilege. To hold otherwise would be to allow the defendant Coudert to use a device of federal law (the bankruptcy code) to choose the forum and accompanying choice of law—a practice forbidden by *Klaxon*. *See Van Dusen*, 376 U.S. at 638; *see also Ferens*, 494 U.S. at 524. It would also lead to the ironic result that New

York's anti-forum shopping borrowing statute would be applied to defeat the claim of a party that did not shop for New York as a forum.

We recognize that our opinion in *In re Gaston* employs some broad language, in dicta, that could be read as reaching every state law claim in every bankruptcy case without exception.[10] But *In re Gaston* did not address a claim like Statek's, which is identical to and inseparable from others pending between the parties in foreign jurisdictions. If *In re Gaston* were extended to reach such cases, we believe some of the very principles that case seeks to advance—namely harmony between state and federal courts—would be undermined.

For cases such as this one, we hold that bankruptcy courts should follow *Van Dusen* and look to the choice of law rules of the state where the underlying prepetition complaint was filed. This is the appropriate course of action where, as here: (1) the claim before the bankruptcy court is wholly derived from another claim already pending in a parallel, out-of-state, non-bankruptcy proceeding; and (2) the pending original, or "source," claim was filed in a court prior to the commencement of the bankruptcy case.

III. Conclusion

In denying Statek's motion to reconsider, the bankruptcy court stated it was "bound by the Second Circuit's determination in *In re Gaston*" to apply New York choice of law rules. That reading of *In re Gaston* constituted a legal error, and thus *ipso facto* was an abuse of discretion. *See In re Highgate Equities, Ltd.*, 279 F.3d at 152. Statek's proof of claim was functionally an extension of its prepetition claim pending in a lawsuit against Coudert. By filing

[10] For example, our opinion in *In re Gaston* includes the statement: "[W]e decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state." 243 F.3d at 601-02.

the underlying action in Connecticut, Statek exercised its right as plaintiff to choose the venue in which it wanted to litigate the claim, and it was entitled to take advantage of whatever choice-of-law rules that selection entailed. Coudert's subsequent filing for bankruptcy in New York, which in essence approximated a defendant-initiated venue transfer, did not deprive Statek of the state-law advantages attending its original choice of forum.

The portion of the district court's order affirming the bankruptcy court's July 21, 2009, order disallowing claim number 239 is VACATED, and the case is REMANDED with instructions to DISMISS IN PART for lack of subject-matter jurisdiction. The portion of the district court's order affirming the bankruptcy court's denial of Statek's motion for reconsideration is REVERSED, and the case is REMANDED to the district court with instructions to REMAND IN PART to the bankruptcy court with instructions to apply Connecticut's choice of law rules in deciding Statek's motion to reconsider.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: February 28, 2012
Docket #: 10-2723bk
Short Title: In Re: Coudert Brothers LLP

DC Docket #: 09-cv-9561
DC Court: SDNY (NEW YORK CITY)
DC Judge: Hellerstein

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website http://www.ca2.uscourts.gov.

Judgment was entered on February 28, 2012; and a mandate will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to 212-857-8560.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Hellerstein

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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Date: February 28, 2012
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DC Docket #: 09-cv-9561
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DC Judge: Hellerstein

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COUDERT BROTHERS LLP

8/21/12

ORDER VACATING AND REMANDING THE DECISION OF THE BANKRUPTCY COURT

09 Civ. 9561 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Statek Corporation had a pending lawsuit against Coudert Brothers LLP, its former attorneys, and filed a claim against Coudert in Coudert's bankruptcy, in the amount of approximately $87 million. The Bankruptcy Court for the Southern District of New York (Drain, J.), dismissed Statek's claim, holding in an order of July 22, 2009 that New York's choice of law rules (as well as New York's borrowing statute, CPLR § 202) applied, and that the claim was barred by the running of limitations. Statek appealed from that decision, and from the denial of its motion for reconsideration. On June 14, 2010, I affirmed the ruling of the bankruptcy court. In re Coudert Bros. LLP, 09 Civ. 9561 (AKH), 2010 U.S. Dist. LEXIS 58467 (S.D.N.Y. June 11, 2010).

Statek appealed my ruling, and on February 28, 2012 the Second Circuit vacated and remanded. Following the Second Circuit's instructions, I rule that the portion of my order affirming the bankruptcy court's July 21, 2009 order disallowing claim number 239 is dismissed for lack of subject matter jurisdiction. The portion of my order affirming the bankruptcy court's denial of Statek's motion for reconsideration is remanded to the bankruptcy court with instructions to apply Connecticut's choice of law rules in deciding Statek's motion to reconsider.

SO ORDERED.

Dated: August 21, 2012
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

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Counsel for Statek Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Coudert Brothers LLP, Debtor.	Chapter 11 Case No. 06-12226 (RDD)

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF STATEK CORPORATION'S MOTION FOR RECONSIDERATION

In light of the Second Circuit's February 28, 2012 decision in this case, *In re Coudert Bros. LLP*, 673 F.3d 180 (2d Cir. 2012), and the District Court's August 21, 2012 remand order, Statek Corporation ("Statek") respectfully submits this memorandum of law in further support of its motion for reconsideration (Doc. No. 1210) ("Reconsideration Motion") of the Order dated July 21, 2009 (Doc. No. 1208) ("Order") granting the motion of Development Specialists, Inc. ("Plan Administrator"), in its capacity as Plan Administrator for Coudert Brothers LLP ("Coudert"), to disallow Claim No. 239 and/or Dismiss Statek's Amended Complaint (Doc. No. 1153) ("Motion to Dismiss").

As discussed more fully below, Connecticut's choice of law rules dictate that Connecticut law govern the timeliness of Statek's claims. Under Connecticut law, Statek's claims cannot be dismissed as untimely and the Plan Administrator's motion should be denied.

BACKGROUND

As the Court is aware from Statek's prior submissions, *e.g.*, Doc. Nos. 1165 ("Motion to Dismiss Opp."), 1210 (Reconsideration Motion), and 1222 ("Reconsideration Motion Reply"),[1] Statek's claims against Coudert relate to a lawsuit Statek originally filed in 2005 in Connecticut Superior Court, alleging legal malpractice and other wrongs by Coudert that resulted in massive losses to Statek. The facts underlying Statek's claims are set forth in the Amended Complaint (Doc. No. 1153-8).[2]

1. The Plan Administrator's Motion to Dismiss

The Plan Administrator filed its Motion to Dismiss on March 13, 2009; Statek filed its opposition to that motion on April 13, 2009; and the Plan Administrator filed a reply (Doc. No 1172) ("Motion to Dismiss Reply") on April 24, 2009. The parties' briefing focused on the Plan Administrator's primary argument that the Court should use New York choice of law rules to identify the statute of limitations applicable to Statek's claims. *See, e.g.*, Motion to Dismiss at 8-12. Nevertheless, both parties briefly addressed the application of Connecticut's limitations law, with the Plan Administrator relying on the three-year limitations period for tort actions set forth in Connecticut General Statutes § 52-577, *id.* at 14, and Statek arguing that its claims were timely filed under Connecticut law because the statute was tolled by Coudert's "continuing course of conduct," Motion to Dismiss Opp. at 46.

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1. In light of the voluminous prior briefing, Statek refers to and incorporates by reference its earlier submissions detailing the factual background and procedural history of its claims. This memorandum will focus on more recent developments, particularly the Second Circuit's decision.

2. For purposes of this Motion and the Plan Administrator's underlying Motion to Dismiss, the facts as pled in the Amended Complaint must be accepted as true, and all inferences from the pleaded facts drawn in Statek's favor. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Securities LLC*, 568 F.3d 374, 377 (2d Cir. 2009) (citing *Wojchowski v. Daines*, 498 F.3d 99, 104 (2d Cir. 2007)).

The Court heard oral argument on May 18, 2009, and, applying New York's borrowing statute, ruled that Statek's claims were time-barred under New York's statute of limitations. *See* Ex. A (May 18, 2009 Transcript) at 94-95; *see also* Order at 1-2.

2. Statek's Motion for Reconsideration

Statek filed the Motion on July 31, 2009, seeking reconsideration of the Order and asking the Court to apply Connecticut choice of law rules to determine the applicable statute of limitations. Reconsideration Motion at 2-3. The Plan Administrator filed its opposition to the Motion on August 14, 2009 (Doc. No. 1212) ("Reconsideration Motion Opp."); and Statek filed a reply on August 20 (Doc. No. 1214) ("Reconsideration Motion Reply"). The Court denied the Motion on September 8, 2009 (Doc. No. 1225) and Statek filed a Notice of Appeal (Doc. No 1227).

3. Statek's District Court and Second Circuit Appeals

The case proceeded through the appellate process in both the District Court and the Second Circuit. Throughout that process, both parties focused on the sharply contested question of what state's choice of law rules should supply the applicable statute of limitations. The Second Circuit ultimately ruled "with instructions to apply Connecticut's choice of law rules in deciding Statek's motion to reconsider." *In re Coudert*, 673 F.3d at 191.

ARGUMENT

1. Connecticut's Choice of Law Rules Dictate that Connecticut Law Governs the Timeliness of Statek's Claims

Connecticut's choice of law rules provide that identifying the statute of limitations applicable to a given claim requires a court to determine whether a statute of limitations is "procedural" or "substantive" with respect to that claim. *Baxter v. Sturm, Ruger & Co., Inc.*, 644 A.2d 1297, 1299 (Conn. 1994). If the statute of limitations is deemed procedural,

Connecticut law (the *lex fori*) will govern. *Id.* (citing *Thomas Iron Co. v. Ensign-Bickford Co.*, 42 A.2d 145 (Conn. 1945); *Morris Plan Ind. Bank v. Richards*, 42 A.2d 147 (Conn. 1945)). If, on the other hand, the limitation is deemed substantive, the foreign statute of limitations (the *lex loci delicti*) will govern. *Id.* (citing *Thomas*, 42 A.2d 145).

The general rule in Connecticut is that statutes of limitations are procedural rather than substantive. *Baxter*, 644 A.2d at 1299 (citing *Morris*, 42 A.2d 147). A limitation period is considered substantive "*only* when it applies to a new right created by statute" as opposed to a right that existed at common law. *Id.* (citing *Thomas*, 42 A.2d 145; *Morris*, 42 A.2d 147) (emphasis added). Tort claims such as legal malpractice and breach of fiduciary duty existed at common law. *See, e.g.*, *Conn. v. Marsh & McLennan Cos., Inc.*, 944 A.2d 315, 321 n.10 (Conn. 2008); *Sanborn v. Greenwald*, 664 A.2d 803, 809-10 (Conn. App. Ct. 1995); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 587 (1990).

Because Statek has asserted common law claims, Connecticut's choice of law rules dictate that the statute of limitations applicable to those claims is procedural. Accordingly, Connecticut law governs the timeliness of Statek's claims. *See Baxter*, 644 A.2d at 1299.

2. Statek's Claims Should Not Be Dismissed As Untimely

Connecticut's general tort statute of limitations provides that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Conn. Gen. Stat. § 52-577 (2010). The Plan Administrator's Motion to Dismiss took note of Connecticut's statute of limitations, Motion to Dismiss at 14, and likewise noted that the statute of limitations may be tolled by a defendant's fraudulent concealment, *id.* at 14 n.8, but neglected to address another, highly significant tolling rule. Under Connecticut law, the

statute of limitations may be tolled by a defendant's "continuing course of conduct." *See Vanliner Ins. Co. v. Fay*, 907 A.2d 1220, 1230-31 (Conn. App. Ct. 2006).

The continuing course of conduct doctrine applies where a defendant committed an initial wrong upon the plaintiff and the defendant's breach of duty "remained in existence after commission of the original wrong related thereto." *Vanliner*, 907 A.2d at 1230 (citation omitted). The doctrine will toll the statute of limitations in cases where the defendant's wrong is ongoing and "the situation keeps evolving after the act complained of is complete." *Sanborn*, 664 A.2d at 808. A defendant's breach of a continuing duty can be demonstrated with proof of "later wrongful conduct . . . related to the prior act," or where a "special relationship between the parties" gives rise to a continuing duty. *Vanliner*, 907 A.2d at 1231.

Coudert's breaches of its professional and fiduciary duties arise from a "special relationship" between the parties: the attorney-client relationship. *See Blinkoff v. O & G Indus., Inc.*, 965 A.2d 556, 564 (Conn. App. Ct. 2009); *Dixon v. Evans*, No. LLICV0750016575S, 2008 Conn. Super. LEXIS 933, at *2 (Conn. Super. Ct. Apr. 22, 2008). As set forth in the Amended Complaint, Coudert's continuing breach of its duties to Statek persisted through at least 2004 (*see* Amended Complaint ¶¶ 26-55) and, indeed, continue to this day.[3]

Moreover, the Connecticut Rules of Professional Conduct make clear, in multiple sections, that an attorney has fiduciary duties with respect to a client's property, and that those

3. As recently as 2009, Coudert produced documents to Statek that it had failed to produce when Statek made its original request in 1996 for *all* documents and information regarding Coudert's legal services. *See* Exs. B (e-mail from the Plan Administrator's counsel, dated Dec. 8, 2008), C (letter from the Plan Administrator's counsel, dated Feb. 19, 2009) (both forwarding additional material to Statek). One of the e-mails produced in December 2008 mentions a "deed packet," but Coudert has yet to produce that document to Statek or disclose what property it relates to. *See* Ex. D (e-mail discussing "deed packet," dated October 29, 2002). Although the inquiry under Federal Civil Rule 12(b)(6) and Bankruptcy Rule 7012(b) is limited to the face of the complaint, when the parties ultimately present their evidence on this issue, Statek will demonstrate the ongoing nature of Coudert's breaches.

duties survive the termination of the relationship. *See, e.g.*, Conn. Super. Ct. Civ. Rule 1.15(b) (2010) ("[c]omplete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation."); Rule 1.15(e) ("Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive"); Official Commentary to Rule 1.15 ("A lawyer should hold property of others with the care required of a professional fiduciary."); Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled").

As the Connecticut Appellate Court stated in *Sanborn*, the determination as to whether the continuing course of conduct doctrine applies to toll the statute of limitations is "conspicuously fact-bound." 664 A.2d at 807 (citation omitted). The Plan Administrator has nevertheless argued that the attorney-client relationship between Coudert and Statek (and, by extension, Coudert's duties to Statek) terminated at some point prior to November 5, 2002, making Statek's claims untimely. *See, e.g.*, Motion to Dismiss Reply at 16-19. Not only is that argument wrong as a factual and legal matter, it is patently invalid on a motion to dismiss because a court deciding a Rule 12(b)(6) motion looks "only to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). As such, the Plan Administrator's invitation for the Court to "rely" on deposition testimony to resolve this issue is wholly inappropriate. *See* Motion to Dismiss Reply at 16 n.16. During oral argument on the Motion to Dismiss, the Plan Administrator's counsel ultimately conceded that its arguments on

this issue "wouldn't be a 12(b)(6) type of … matter" and were "moving more to the factual determination [than] might be appropriate" at the motion to dismiss stage. Ex. A at 9-11.

A defendant's motion to dismiss must be denied unless "it appears beyond doubt that the non-moving party could prove no set of facts that would entitle it to relief." *Calcutti v. SBU, Inc.*, 224 F. Supp. 2d 691, 696 (S.D.N.Y. 2002) (citations omitted). Time and again, courts have denied motions to dismiss based on statute of limitations arguments that implicate disputed factual issues. *See, e.g.*, *id.* at 700 (denying motion to dismiss legal malpractice claim on statute of limitations grounds where the parties disagreed over when their attorney-client relationship ended); *see also In re Adelphia Comms. Corp.*, 365 B.R. 24, 59 (Bankr. S.D.N.Y. 2007) (denying motion to dismiss on statute of limitations grounds where the application of the statute of limitations and tolling doctrines presented questions of fact). The Court should reach the same result here, as Statek's claims are timely under Connecticut's statute of limitations in light of the continuing course of conduct doctrine. Statek's claims cannot be time-barred "on the face of the complaint." *Cf. Roth*, 489 F.3d at 509.

CONCLUSION

The application of Connecticut's choice of law rules is straightforward in this case. Because Statek has asserted common law claims based on Coudert's breaches of its professional and fiduciary duties, the statute of limitations is deemed "procedural" under controlling Connecticut law. Accordingly, Connecticut's statute of limitations governs Statek's claims. Those claims are timely under Connecticut law because they arise from a continuing course of conduct through which Coudert breached its duties to Statek. Coudert's wrongful conduct extended well into the three-year period preceding commencement of the Connecticut lawsuit underlying Statek's claim, and it continues to this day. The Plan Administrator cannot

demonstrate, based on the face of the complaint, that Statek can prove no set of facts that would entitle it to relief, and therefore the Motion to Dismiss does not meet the applicable legal standard and must be denied.

Based on the foregoing and as required by the Second Circuit's ruling, Statek respectfully submits that the Court should grant reconsideration of the Order disallowing Claim No. 239 and, upon reconsideration, deny Coudert's motion to dismiss because it fails to meet the applicable standards under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b).

Dated: August 24, 2012

HUGHES HUBBARD & REED LLP

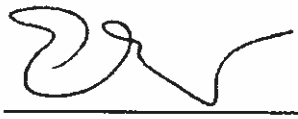
By: 

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:	:	06-12226
	:	
COUDERT BROTHERS LLP,	:	One Bowling Green
	:	New York, New York
Debtor.	:	
	:	May 18, 2009

TRANSCRIPT OF MOTION TO DISALLOW CLAIMS
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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211 N. Milton Road
Saratoga Springs, NY 12866

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

(Proceedings began at 10:13 a.m.)

COURT OFFICER: Be seated.

THE COURT: Okay, good morning.

MS. FRIEMAN: Good morning.

MR. RITT: Good morning, Your Honor.

THE COURT: Coudert Bothers, and Plan Administrator v. Statek claim objection.

MS. FRIEMAN: Good morning, Your Honor. I'm Karen Frieman from Stern Tannenbaum & Bell. We represent the plan administrator Coudert Development Specialists, Inc., and we're here today on DSI's application to disallow Claim No. 239 of the Statek Corporation.

THE COURT: Right. And as I told you all in our telephonic prehearing conference, I'm treating this hearing as covered under the adversary proceeding rules and one in the context of the parties' briefing under Rule 12(b)(6).

MS. FRIEMAN: Yes, Your Honor. Thank you.

THE COURT: Okay.

MS. FRIEMAN: There are two grounds for DSI's application to disallow the claim of 239. The first is that the claim is time barred. The Second Circuit's decision in Bianco in the Gaston & Snow bankruptcy case, requires the application of New York's choice of law to the determination of the appropriate statute of limitations in this case, and that requires the application of New York's borrowing statute, which

is Section 202 of the Civil Practice Law and Rules. The borrowing statute provides that the shorter of New York's statute of limitations or the statute of limitations of the state where the cause of action accrued should be applied. New York's three year statute of limitations would apply to the claims alleged, underlying claim 239, and the three year statute of limitation would bar the claims here. The complaint was served in this action on November 5th, 2005, and it's based on actions that were allegedly taken by Coudert in September of 1996. So the claims would clearly be barred under New York statute of limitations, and I think that really the inquiry can end there.

But, in any event, we also believe that the claim would be barred under any other possible statute of limitations. Statek itself concedes that the claim would be barred under the statute of limitations of either New York or California, and it seems that if New York statute doesn't apply, then it should be the statute of California that does apply. California has a one year/four year statute, meaning that the -- under Section 340.6 of the California Code of Civil Procedure the statute of limitations is the shorter of one year after the discovery of the wrong or four years from the commission of the wrong. Under the four year statute the claim would have tolled in 2000, and under the one year, since the alleged wrong was discovered no later than 2002, the claim

would have been barred in 2003. And, as I said, Statek concedes that California statute of limitations would bar the claim as well.

Statek tries to avoid the application of the Bianco case on several grounds, none of which, respectfully, Your Honor, we believe would stand scrutiny. First they claim that under the Supreme Court's ruling in Katz, Bianco should not be followed because there is a predominant federal interest in applying an independent federal analysis of the appropriate choice of law. We do not think that Katz stands for that proposition. Katz was a narrow holding relating to the proprietary of a state asserting the defense of sovereign immunity in a bankruptcy claim, in a bankruptcy case, and the Supreme Court there held that the federal interest in treating state and private creditors uniformly required that the state would not be allowed to assert its sovereign immunity claim. Moreover, we think that Bianco actually forecloses the argument that there's a federal interest in -- that there is a federal interest which trumps the general rule that New York's choice of law in the statute of limitations issue should be followed. And indeed we cite cases in our brief where Bianco was cited with approval in this district following the Supreme Court's decision in the Katz case.

Statek argues that the paramount federal interest, which they allege is present, is, one, in preventing the debtor

from improving its position by filing a bankruptcy. In other words, I think Statek's argument is that it would be unfair for Coudert to be able to improve its position vis-a-vis Statek by getting the benefit of the New York borrowing statute by its filing in -- its filing its bankruptcy in New York. And really what that is is an argument that debtors should be discouraged from forum shopping. And Coudert Brothers LLP, which is the debtor, is a New York limited partnership that has been headquartered in New York for 150 years prior to the filing of its bankruptcy, and we don't think that there's any basis whatsoever for any kind of implication that there was any forum shopping involved by Coudert filing its bankruptcy in New York in connection with one claim raised by Statek. In fact, New York was the only place that made sense for Coudert to file its bankruptcy, and certainly the filing was appropriate under Section 1408 of Title 28 of the United States Code.

But if, even if the borrowing statute doesn't apply, as I've already noted, the California statute would bar the claim. Statek concedes -- alleges that it is a corporation organized in the state of California with its principal place in California, and that is where it should be deemed to have suffered any alleged injury from the results here so it -- from the alleged acts by Coudert here. So that statute -- that state statute of limitations should apply. Statek points out that perhaps the Court should look to Section 142 of the

Restatement Second of Conflict of Laws, but that provision also states that the forum statute of limitations should apply to this case, and that brings us right back to New York statute and New York's borrowing statute. Section 142 of the Restatement does note that there can be an exception from this rule in the -- if there are extraordinary circumstances making the result unreasonable, and Statek alleges that there are in fact such circumstances making the application of New York statute unreasonable.

Statek, for example, claims that the public policy of New York and California in the creation of their statute of limitations was to limit the liability of attorneys in their jurisdiction and of malpractice insurers in their jurisdiction. This, respectfully, we don't believe is a basis for the refusal to apply New York statute of limitations here. Coudert, after all, is a New York partnership, and it certainly would be completely within the public policy of the state to apply the statute of limitations to it. Statek also claims that it would be unreasonable because the statute of limitations could have run before a plaintiff would be aware of the existence of its claim. But that is not a situation that is unusual. It's -- we cite cases in our brief that show that it's not -- it's the situation not only in New York and California but Connecticut as well recognizes the possibility that the application of its statute of limitations could result in a claim being barred

before the plaintiff was aware of it. We also would submit that we don't know how it could be unfair to apply California's statute of limitations against Statek, which, as I noted, is a California corporation and has its principal place of business, Statek claims, there as well. Statek next argues that --

THE COURT: Before you get on --

MS. FRIEMAN: Yes.

THE COURT: -- to the next argument, it's a little murky in the papers before me, but the claim was also asserted on behalf of TCI, which is a Delaware corporation?

MS. FRIEMAN: TCI-II. Yes, Your Honor, but what happened, just to take a step back and do some history, the original claim filed by Statek in this action was based on the complaint that it had filed, which was filed both by it and by TCI-II in Connecticut. Coudert subsequently filed for bankruptcy. The automatic stay went into place. The parties entered into a stipulation, which was so ordered by Your Honor, which provided for the lifting of the stay for two limited purposes. One, as you know, was to allow the parties to go to mediation before Judge Morris, and the second purpose was to allow Statek to amend its complaint. Statek did amend its complaint significantly, and one of the significant things that it did in its amendment was drop TCI-II as a plaintiff in the case. So Statek is the only plaintiff, and I believe it should be viewed as the only claimant.

THE COURT: Okay.

MS. FRIEMAN: So Statek, on the statute of limitation argument, next argues that the Court should look to the state with the most significant relationship in determining which state statute of limitations should apply, and it offers Connecticut as the jurisdiction where it commenced the suit where the statute of limitations should be examined. But elsewhere in its papers, particularly, for example, at pages 36 and 38 of its memorandum of law, it states that it has not transacted business and does not transact business in Connecticut. But, in any event, we submit that the claim would be barred by the three year Connecticut statute of limitations which is set forth in Connecticut General Statutes Section 52-577. That statute provides for a three-year statute of limitations commencing upon the wrongful action, which in this case would have barred the statute -- excuse me, would have barred the claim in September of 1999, three years after the alleged wrong in September of 1996. To avoid the application of that statute Statek alleges that the doctrine of continuing course of conduct tolls the statute of limitations. But we submit that Statek's interpretation of that -- that that doctrine doesn't apply, and that Statek's interpretation of that doctrine is overbroad and unreasonable.

To begin with, in order to come under the protection of that doctrine, Statek would need to demonstrate a continuing

duty. And Statek essentially in its papers posits a duty that goes on forever until the duty it alleges is satisfied. So basically they're claiming there could never be an end, there would never be repose, that the statute would go on forever. Moreover, the basis for the duty would have to be the attorney-client relationship between Statek and Coudert, and Statek itself states that the evidence of when that relationship terminated was, quote unquote, equivocal. To come within the continuous course of duty -- excuse me, continuous course of conduct exception Statek would have to show that the attorney-client relationship existed until at least November 5th, 2002, and that's because it would have to be within three years from when it served its complaint on November 5th, 2005. So the relationship had to exist after November 5th, 2002, but it's conceded in this action that Coudert rendered no legal advice to Statek after the summer of 1996. Statek also tries --

THE COURT: Where is that conceded?

MS. FRIEMAN: That is in the deposition of Ms. Verrin [Ph.] in this case. It's Exhibit H to my moving affidavit at pages 245 and 246.

THE COURT: All right. But that wouldn't be a 12(b)(6) type of --

MS. FRIEMAN: That's true, Your Honor.

THE COURT: -- matter, right?

MS. FRIEMAN: And there are other grounds that -- you

can avoid that issue all together and still rule in our favor on this for the reasons that I'm going to get to.

THE COURT: Okay.

MS. FRIEMAN: So Statek tries to rely on three other indicia of a continuing duty between -- owed by Coudert. First, it claims that Coudert held some money in its accounts belonging to Statek until 1998. And even if that were so -- so this -- we're completely avoiding this fact issue -- even that were true, the statute would run three years after that in 2001 and doesn't do anything to save Statek's claim. Secondly, Statek argues that a different entity called Dean's Court acted as a secretary for a separate corporate entity from Statek called Statek Europe Limited. Any relationship, we submit, between these two entirely separate entities would not serve to demonstrate a continuing relationship between Coudert Brothers LLP and Statek Corporation, and it's interesting, Your Honor, that Statek doesn't state in their papers when that believe that relationship ended in any event. And finally Statek claims that Coudert never gave notice of termination -- never gave notice that it was terminating the attorney-client relationship with Statek. And there's no, absolutely no requirement in the law that Coudert have done any such thing. The law is clear that there could be a de facto termination of an attorney-client relationship. But again that, you know, may be moving more to the factual determination that might be

appropriate at this time.

But, in any event, aside from the fact that we submit there's no continuing duty, there's really no continuing course of conduct, which would be necessary to support this exception to Connecticut's three-year statute of limitations. Statek relies in demonstrating continuing course of conduct subsequent productions of documents to it by Coudert. So, in other words, it's Statek's position that if Coudert had provided the documents that it provided in 1996 and never provided another piece of paper to Statek, even though, you know, it was asked to look for them and it found them and it turned them over, if Coudert had said we have nothing, we have nothing else, we wipe our hands, we move away, if they never produced a single other piece of paper, then the statute of limitations had run. But because Coudert attempted to continue to search its records at various times and continued to provide documents to Statek, that somehow those actions are evidence of a continuing wrong sufficient to toll the statute of limitations. And we cite two cases in our brief, Bellemare and Sanborn, Your Honor, for the proposition that the wrong is the single act when it occurs and is not a continuing one. So, in short, we think that the claim is clearly barred by the statute of limitations of Connecticut and that the continuing course of conduct doctrine does not act in this situation to extend the statutory period.

Finally, Statek claims that English law should apply

because England has a significant interest in regulating the conduct of attorneys in its jurisdiction. And we submit that that interest in fact is not implicated in this case. The defendant Coudert Brothers LLP is a New York limited liability partnership. Its English office, which Statek had dealings with, Statek concedes in its papers was closed before the action commenced, and the attorney-client relationship was centered in the United States during the relevant period of time.

THE COURT: But why is that? I mean wasn't there the request made of the English solicitors that did the work?

MS. FRIEMAN: The request was made --

THE COURT: In '96?

MS. FRIEMAN: Yes, it was made to them in England. But the relationship itself, the attorney-client relationship itself between Statek and Coudert was really centered in Connecticut. And this really -- in the United --

THE COURT: Why is that?

MS. FRIEMAN: Because all -- Statek during the time that it was represented by Coudert maintained a place of business in Connecticut. All communications were between Connecticut and London, bills were sent to Connecticut. As I said, communications were made -- and paid from Connecticut, and communications were between England and Connecticut.

THE COURT: But the exception in the case law where

you're dealing with malpractice cases and professional negligence cases where they look to the interest of the state in regulating attorneys doesn't focus on where the injury occurred, it focuses on where the particular attorneys who were committing malpractice were, you know, members of the bar.

MS. FRIEMAN: Right.

THE COURT: So why wouldn't it -- I mean if ultimately this is an issue of English malpractice law, I'm still having a hard time seeing why English law -- I'm not talking about borrowing statutes, I'm talking about the underlying --

MS. FRIEMAN: Right.

THE COURT: -- law at this point, why English law wouldn't apply.

MS. FRIEMAN: Well, let me try to answer that question in two different ways, if I could, Your Honor. First, in 1996 clearly the people from Coudert who were involved were in England. That's clear. At some point the partner in charge moved to the New York office, and there were communications back and forth between Statek and the New York office relating to the continuing production of files.

THE COURT: But that -- but to me that would only apply if there's some sort of continuing wrong argument as opposed to looking back to '96

MS. FRIEMAN: Uh-huh. And the second --

THE COURT: I'm not ruling that out.

MS. FRIEMAN: Right.

THE COURT: I'm just saying that it seems to me the first wrong, the primary wrong was in '96 --

MS. FRIEMAN: Right.

THE COURT: -- if there was one.

MS. FRIEMAN: I think that that's right, Your Honor. The second thing -- the second way I would try to answer Your Honor's question is that the New York's choice of law rules on the substantive issue as opposed to the statute of limitations issue, looking at which jurisdiction's law should apply on the -- to the underlying tort --

THE COURT: Right.

MS. FRIEMAN: -- looks to where the last act that made the tort actionable occurred.

THE COURT: Right.

MS. FRIEMAN: And there's a 2009 case, Associated Press v. All Headline News Corp., it's a 2009 Westlaw 382690, and, as I said, it's Southern District of New York, February 17, 2009. And that case states that in making that determination the last event that made the tort actionable is the place of injury.

THE COURT: Right.

MS. FRIEMAN: And that in this case would be California where Statek is --

THE COURT: But isn't there an exception to that again when -- one that you're dealing with attorney malpractice claims?

MS. FRIEMAN: Well --

THE COURT: I mean Statek cites a number of cases that look to an overriding interest in the state that regulates the attorneys that would override the general place of wrong determination.

MS. FRIEMAN: I'm not sure that they override. I would say that I -- my reading of those cases is that it's a factor that the courts look to in determining which forum's jurisdiction should apply.

THE COURT: Okay. All right.

MS. FRIEMAN: But, in any event --

THE COURT: And I guess you're saying that since it was a New York LLP anyway that --

MS. FRIEMAN: Right.

THE COURT: -- maybe New York law has an interest in dealing with New York LLPs.

MS. FRIEMAN: Right. And also, Your Honor, there's really a malpra -- there hasn't been a claim for malpractice stated in the complaint.

THE COURT: Okay.

MS. FRIEMAN: So, anyway, even if English would apply, we believe that it would be barred under English law

first, as Your Honor alluded to earlier, the application of the borrowing statute would make English law irrelevant in any event. But beyond that English law provides for a six-year statute of limitations from the wrong, which again would have tolled -- would have -- the statute would have run in September of 2002, or it has an exception for -- which extends the statute of limitations to three years from what is called the starting date in the English statute. And we submit that Statek's starting date analysis should not be adopted in this case. As explained by Statek, as argued by Statek, the starting date depends entirely on the fortuity of its own actions of when it asked for more documents which resulted in the production of documents in 2002. They also -- there's no indication in its papers that the statute of limitations under English law and its interpretation would ever end, that the claim would ever be barred. Because not only do they claim that the statute doesn't run until additional documents were asked for by them and then produced, but that then they had some kind of amorphous open-ended time to have analyzed those papers before the starting date would even have run. So basically they're arguing for a situation where there would be no applicable statute of limitations, where it would be almost impossible for this claim to ever be time barred, and we don't think that that should be adopted. And again this may be inching a little too close to the summary judgment side of

things, and I'll just, you know, offer it as an aside and move on. But clearly by -- in even asking for the documents in 2002, which occurred before November of 2002, Statek demonstrated that it had at least an issue as to whether all documents had been produced and some kind of concern that they had not been. So it could very well be that the starting date should have started well before and would have been -- would have expired by then.

So for all of those reasons, we believe that Statek's claims are time barred. We also think that the claim 239 should be disallowed because we don't think that Statek has stated a claim upon which relief can be granted. If you look at the claim in the amended complaint, it's in one paragraph and it says on its face that it is a claim for something called breach of fiduciary duty and something called breach of professional duty, and Statek has now claimed in its papers that it is not asserting a claim for fiduciary duty. And I think that it had to make that admission because the law in Connecticut and in fact in England as well is clear that you can state a -- claim fiduc -- the absence of an allegation of dishonesty, disloyalty, self-dealing. There's no allegation whatsoever in the amended complaint of any such thing. And any claim for a breach of fiduciary duty would have to be dismissed. And I believe for that reason Statek has stated in its papers that it is not, contrary to the language of the

amended complaint, asserting a claim for breach of fiduciary duty. There is a small exception to that, and I'm going to jump over just for a second to take care of that.

THE COURT: That's on the money?

MS. FRIEMAN: That's on the 43 odd thousand dollars that Statek -- excuse me, Coudert Brothers had and disbursed and has been unable -- disbursed according to the instructions of Statek, but has been unable to provide a cancelled check showing to whom the money was disbursed. The disbursement was in 1996, and there's no allegation that the disbursement of that money was motivated in any way by any disloyalty or dishonesty or self-dealing or anything like that by Coudert. So even that small breach of fiduciary duty claim would have to be dismissed based on the law of Connecticut or the law of England. In addition, because that occurred in 1996 and Statek was aware of that in 1996, under any potentially applicable statute of limitations that claim for the $43,000, odd thousand dollars should be barred. So it seems to us clear that any claim for breach of fiduciary duty at all has -- should be disallowed either because as a matter of law or because it's been abandoned by Statek itself.

So then we're left with trying to figure out what's left of Statek's claim as asserted in its amended complaint. And Statek seems to be claiming that there is some kind of what I read to be a negligent breach of fiduciary duty claim based

on the Bristol case that it cites from England. Because it's not -- nowhere in the amended complaint is there an allegation of negligence, nowhere in the amended complaint is there an allegation of legal malpractice, although such claims, based on different facts, I concede, but both claims were asserted in the original complaint. So we're trying to figure out what it is that Statek is claiming, and as I said, as we understand it, Statek is essentially claiming some kind of negligent breach of fiduciary duty claim under English law.

Now, assuming for the sake of argument -- we talked a little bit about this before in answer to one of Your Honor's questions about English -- whether or not English law should apply and we don't think it should for the reasons we stated to Your Honor and set forth in the brief, and just briefly we want to talk about some other arguments that Statek offers for the application of English law. For example, Statek argues that Section 145(2), the restatement section of conflict of laws, requires the application of English law. But we submit that the factors set forth in that section of the restatement in fact do not point to English law. The first factor is the place of injury, and the place of injury here is either in California or Connecticut. The law is clear that a corporation is injured either where it is incorporated or in its principal place of business. There's no dispute that Statek is a California corporation. Statek alleges that its principal

place of business is in California, and at some point it alleged that at least in 1996 and before its principal place of business was in Connecticut. In any event, it doesn't allege that it was either incorporated or had a principal place of business in England. Faced with that, those facts, Statek argues for the application of the extremely unusual separate financial base doctrine. It claims that it had a separate financial base in England, and the basis for that claim essentially is its allegation that that's where the wrong occurred. But the Baena case is very much on point, cited in our brief, and rejects the concept that a corporation suffers its financial loss where the wrong occurs as opposed to where its principal place of business is or where it is incorporated. Statek essentially had no separate financial existence in England. Everything it did was over here. The only factors it points to, as I said, in England are the wrong, and that's not what to look to in determining where the injury is suffered. The second factor is where the wrong occurred, and if you look only to 1996, then we would concede that that was in England. If it was more of a continuing problem, which we don't believe is the case, then it was in England or -- and/or in New York. The third factor is where the parties are incorporated or have their principal place of business, and again that's Connecticut, California or New York. And as I mentioned before, there's a question of where the relationship was